

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL GOETZ,)
Plaintiff,) No. CV-09-03060-JPH
v.)
MICHAEL J. ASTRUE, Commissioner) ORDER GRANTING PLAINTIFF'S
of Social Security,) MOTION FOR SUMMARY JUDGMENT
Defendant.) AND REMANDING FOR FURTHER
) ADMINISTRATIVE PROCEEDINGS
)
)
)

BEFORE THE COURT is plaintiff's motion for summary judgment (Ct. Rec. 19) and defendant's motion to remand for further proceedings (Ct. Rec. 26), noted for hearing without oral argument on October 29, 2010. Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 7). On June 29, 2010, plaintiff filed a reply (Ct. Rec. 28). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** plaintiff's motion for summary judgment (Ct. Rec. 19) and remands for further administrative proceedings. Defendant's motion to remand for further administrative proceedings (Ct. Rec. 26) is **DENIED** as moot.

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JURISDICTION

Plaintiff protectively filed concurrent applications for disability insurance benefits (DIB) and supplemental security income (SSI) benefits on September 16, 2004, alleging onset as of August 15, 2003 (Tr. 51-52). The applications were denied initially and on reconsideration (Tr. 29-32, 33-34).

7 After remand ordered by this Court, Administrative Law Judge
8 (ALJ) Richard Say held a hearing on January 28, 2009 (Tr. 479-
9 516). On March 19, 2009, he issued a decision finding Mr. Goetz
10 disabled as of September 29, 2006, but not prior to his last
11 insured date of December 31, 2005 (Tr. 333-348). The ALJ found
12 before September 29, 2006, plaintiff could have performed his past
13 work as an author or restaurant greeter (Tr. 346). The Appeals
14 Council denied review. Therefore, the ALJ's decision became the
15 final decision of the Commissioner, which is appealable to the
16 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed
17 this action for judicial review pursuant to 42 U.S.C. § 405(g) on
18 June 22, 2009. (Ct. Rec. 1,4).

STATEMENT OF FACTS

20 The facts have been presented in the administrative hearing
21 transcripts, the ALJ's decision, the briefs of both Plaintiff and
22 the Commissioner, and are summarized here.

23 Plaintiff was 44 years old at onset and 50 at the time of the
24 ALJ's most recent decision (Tr. 51). Mr. Goetz completed high
25 school (Tr. 482). He has worked as an author, restaurant greeter,
26 teacher, and store manager (Tr. 23, 60, 498). He lives with his
27 spouse (Tr. 482). Plaintiff can sit 20-30 minutes at a time (Tr.

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1 490).

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Social Security Act (the Act) defines disability
4 as the "inability to engage in any substantial gainful activity by
5 reason of any medically determinable physical or mental impairment
6 which can be expected to result in death or which has lasted or
7 can be expected to last for a continuous period of not less than
8 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
9 also provides that a Plaintiff shall be determined to be under a
10 disability only if any impairments are of such severity that a
11 plaintiff is not only unable to do previous work but cannot,
12 considering plaintiff's age, education and work experiences,
13 engage in any other substantial gainful work which exists in the
14 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
15 Thus, the definition of disability consists of both medical and
16 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
17 (9th Cir. 2001).

18 The Commissioner has established a five-step sequential
19 evaluation process for determining whether a person is disabled.
20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
21 is engaged in substantial gainful activities. If so, benefits are
22 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,
23 the decision maker proceeds to step two, which determines whether
24 plaintiff has a medically severe impairment or combination of
25 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

26 If plaintiff does not have a severe impairment or combination
27 of impairments, the disability claim is denied. If the impairment
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1 is severe, the evaluation proceeds to the third step, which
2 compares plaintiff's impairment with a number of listed
3 impairments acknowledged by the Commissioner to be so severe as to
4 preclude substantial gainful activity. 20 C.F.R. §§
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
6 App. 1. If the impairment meets or equals one of the listed
7 impairments, plaintiff is conclusively presumed to be disabled.
8 If the impairment is not one conclusively presumed to be
9 disabling, the evaluation proceeds to the fourth step, which
10 determines whether the impairment prevents plaintiff from
11 performing work which was performed in the past. If a plaintiff is
12 able to perform previous work, plaintiff is deemed not disabled.
13 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step,
14 plaintiff's residual functional capacity (RFC) assessment is
15 considered. If plaintiff cannot perform this work, the fifth and
16 final step in the process determines whether plaintiff is able to
17 perform other work in the national economy in view of plaintiff's
18 residual functional capacity, age, education and past work
19 experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
20 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

21 The initial burden of proof rests upon plaintiff to establish
22 a *prima facie* case of entitlement to disability benefits.

23 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
24 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
25 met once plaintiff establishes that a physical or mental
26 impairment prevents the performance of previous work. The burden
27 then shifts, at step five, to the Commissioner to show that (1)

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1 plaintiff can perform other substantial gainful activity and (2) a
 2 "significant number of jobs exist in the national economy" which
 3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 4 Cir. 1984).

5 **STANDARD OF REVIEW**

6 Congress has provided a limited scope of judicial review of a
 7 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 8 the Commissioner's decision, made through an ALJ, when the
 9 determination is not based on legal error and is supported by
 10 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
 11 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 12 "The [Commissioner's] determination that a plaintiff is not
 13 disabled will be upheld if the findings of fact are supported by
 14 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
 15 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
 16 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
 17 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 18 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 19 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 20 573, 576 (9th Cir. 1988). Substantial evidence "means such
 21 evidence as a reasonable mind might accept as adequate to support
 22 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 23 (citations omitted). "[S]uch inferences and conclusions as the
 24 [Commissioner] may reasonably draw from the evidence" will also be
 25 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
 26 review, the Court considers the record as a whole, not just the
 27 evidence supporting the decision of the Commissioner. *Weetman v.*
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1 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
 2 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to
 4 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
 5 evidence supports more than one rational interpretation, the Court
 6 may not substitute its judgment for that of the Commissioner.
 7 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 8 (9th Cir. 1984). Nevertheless, a decision supported by substantial
 9 evidence will still be set aside if the proper legal standards
 10 were not applied in weighing the evidence and making the decision.
 11 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,
 12 433 (9th Cir. 1987). Thus, if there is substantial evidence to
 13 support the administrative findings, or if there is conflicting
 14 evidence that will support a finding of either disability or
 15 nondisability, the finding of the Commissioner is conclusive.
 16 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

17 **ALJ'S FINDINGS**

18 At the outset, the ALJ found plaintiff met the DIB
 19 requirements through December 31, 2005 (Tr. 333, 335). At step one
 20 he found Mr. Goetz has not engaged in substantial gainful activity
 21 since his alleged onset date of August 15, 2003 (Tr. 335). At
 22 steps two and three, the ALJ found plaintiff suffers from thoracic
 23 degenerative disc disease with chronic pain, osteoarthritis of the
 24 hips, knees, and hands, and depression, impairments that are
 25 severe but which do not alone or in combination meet or medically
 26 equal a Listed impairment (Tr. 336-337). The ALJ found plaintiff
 27 less than completely credible (Tr. 340). ALJ Say found plaintiff

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1 could perform his past work as a restaurant greeter and author
2 before September 29, 2006 (Tr. 346), but not thereafter. Because
3 the ALJ's step four finding plaintiff could perform his past
4 relevant work until September 29, 2006 was determinative, he was
5 not required to proceed to step five. The ALJ found plaintiff is
6 disabled as defined by the Social Security Act as of an inferred
7 onset date of September 29, 2006, meaning he was not disabled for
8 DIB purposes prior to his last insured date in December 2005 (Tr.
9 348), nor for SSI purposes before September 29, 2006.

10 **ISSUES**

11 The parties agree plaintiff became disabled but disagree as
12 to the onset date. Plaintiff asks the court to adopt his alleged
13 onset date of August 15, 2003. The Commissioner admits the ALJ
14 erred by inferring an onset date without the assistance of a
15 medical expert, an error requiring remand. The Commissioner also
16 argues because the ALJ found Mr. Goetz disabled and observed he
17 used narcotics excessively, the ALJ's failure to determine if drug
18 or alcohol abuse (DAA) materially affected the disability
19 determination requires remand (Ct. Rec. 27 at 6). Plaintiff, on
20 the other hand, asks the Court to remand for payment of benefits
21 from his alleged onset date of August 15, 2003, through the date
22 the ALJ found him disabled, September 28, 2006 (Ct. Rec. 20 at 26,
23 Ct. Rec. 27 at 6).

24 **DISCUSSION**

25 Defendant acknowledges the Court has discretion when
26 fashioning a remedy (Ct. Rec. 27 at 2). If there are unresolved
27 issues and the record does not clearly require a finding of
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1 disability, the court should remand for further administrative
 2 proceedings to remedy defects in the original administrative
 3 proceedings. *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir.
 4 2001); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996);
 5 *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989)).

6 Courts in this circuit have credited evidence and remanded
 7 for an award of benefits where (1) the ALJ has failed to provide
 8 legally sufficient reasons for rejecting certain evidence, such as
 9 a treating doctor's uncontested opinion, (2) there are no
 10 outstanding issues that must be resolved before a determination of
 11 disability can be made, and (3) it is clear from the record that
 12 the ALJ would be required to find the claimant disabled were such
 13 evidence credited. See *Smolen*, 80 F.3d at 1292; see also *Rodriguez*
 14 *v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989) (crediting treating
 15 physician's uncontested testimony and awarding benefits);
 16 *Varney v. Secretary of Health and Human Servs.*, 859 F.2d 1396,
 17 1401 (9th Cir. 1988) (crediting subjective symptom testimony and
 18 awarding benefits). The decision whether to remand for further
 19 proceedings or for an award of benefits is within the Court's
 20 discretion. *Harman v. Apfel*, 211 F.3d 1172, 1177 (9th Cir. 2000);
 21 *Reddick v. Chater*, 157 F.3d 715, 728 (9th Cir. 1998).

22 **I. Inferred onset date**

23 Where evidence of the onset date is ambiguous, the ALJ must
 24 consult with a medical adviser. *Armstrong v. Comm'r of Soc. Sec.*
 25 *Admin.*, 160 F.3d 587, 590 (9th Cir. 1998); Soc. Sec. Ruling 83-20
 26 (1983). SSR 83-20 applies where, as here, a claimant has been
 27 found disabled. The ALJ has a duty to fully and fairly develop the
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1 record where evidence is ambiguous. *Tonapetyan v. Halter*, 242 F.3d
 2 1144, 1150 (9th Cir. 2001).

3 Similar to *Armstrong*, the date Mr. Goetz's impairments became
 4 disabling is ambiguous. The ALJ appears to have chosen the date of
 5 treating doctor Kimberly Stutzman, M.D.'s September 29, 2006,
 6 report, even though Dr. Stutzman began treating plaintiff in
 7 September 2003 (Tr. 233). While it is clear Mr. Goetz was disabled
 8 on September 29, 2006, that was not necessarily the date on which
 9 he became disabled. For social security purposes, "the critical
 10 date is the date of the onset of disability, not the date of the
 11 diagnosis." *Swanson v. Sec. of Health & Human Servs.*, 763 F.2d
 12 1061, 1965 (9th Cir. 1985); *Morgan v. Sullivan*, 945 F.2d 1079, 1081
 13 (9th Cir. 1991)(per curiam).

14 In deciding the onset date, the ALJ opines it is reasonable
 15 to conclude plaintiff experienced increasing difficulty with
 16 osteoarthritis between the time he was running several times per
 17 week in 2004¹, and when he underwent hip replacement in 2008. With
 18 respect to mental impairments, the ALJ observes as plaintiff's
 19 pain symptoms increased, so did his periods of depression (Tr.
 20 346). The ALJ acknowledges plaintiff's "increasing difficulty"
 21 with pain and depression, but it is unclear without medical
 22 testimony when the increasing difficulties caused by
 23 osteoarthritis and associated pain and depression became
 24 disabling.

25 A brief overview of some of the evidence illustrates the
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27 ¹Dr. Stutzman notes on September 7, 2004, plaintiff jogs 3
 28 to 4 times a week for 1.5 miles each time (Tr. 183).

1 ambiguity in the record.

2 In April and May 2003 (before alleged onset) plaintiff is
 3 seen in the ER in California for acute myofascial strain, back
 4 pain, dizziness, and mild low back pain (Tr. 108-115). Plaintiff
 5 and his spouse move to Washington from San Francisco in June 2003
 6 (Tr. 192). On August 11, 2003, four days before alleged onset,
 7 Annie Stone, ARNP notes plaintiff aggravated his back pain by
 8 wrestling a sheep. She prescribes vicodin (Tr. 133). In September
 9 2003, just after plaintiff's alleged onset date, Carolyn O'Connor,
 10 M.D., notes plaintiff's back impairment (due to chronic DJD of the
 11 spine and degenerative disc disease) was rated as mild, and his
 12 range of motion "pretty good." She continues prescribed vicodin
 13 and an antidepressant (Tr. 129).

14 On August 25, 2003 (about 2 weeks after plaintiff alleges
 15 onset), Judy Richardson, M.D., declines his request for vicodin
 16 and prescribes ibuprofen instead (Tr. 130). Plaintiff attends two
 17 sessions of physical therapy in September 2003 which he says
 18 improve his movement (Tr. 186). Dr. Stutzman notes in October 2003
 19 Mr. Goetz is taking prozac and trazedone (Tr. 241). At a
 20 psychiatric evaluation on October 7, 2003, plaintiff's assessed
 21 GAF is 55, indicating moderate symptoms or difficulty (Tr. 214);
 22 while evaluator Kimberly Humann, M.D., in March 2006, assesses a
 23 GAF of 65, indicative of mild symptoms or difficulties (Tr. 275).

24 In November 2003 plaintiff tells Dr. Stutzman he has had "a
 25 great deal of thoracic pain requiring narcotics for relief" for
 26 ten years (Tr. 240). On December 16, 2003, Dr. Stutzman tells
 27 plaintiff she reviewed his records from California indicating "he
 28 had a lot of difficulties with narcotics, that he had behavior
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1 which was manipulative and drug seeking." She notes plaintiff has
2 not attended physical therapy as directed due to being "very busy
3 with the birth" of a grandchild in Oregon (Tr. 189).

4 On January 19, 2004, plaintiff fails to attend his physical
5 therapy appointment. He calls Dr. Stutzman the same day stating he
6 lost his pain medication. Dr. Stutzman follows the pain contract
7 and refuses to refill the medication (Tr. 189).

8 Plaintiff sees Dr. Stutzman on February 3, 2004, and returns
9 to physical therapy the same date (Tr. 186, 188). On February 11,
10 2004, he tells urgent care provider Sue Hastings, PAC, he has no
11 primary care physician (PCP)(Tr. 128). In September 2004, a little
12 more than a year after he alleges onset, Mr. Goetz reports he can
13 walk or sit for 40 minutes and stand for 30. He takes vicodin for
14 thoracic back pain due to scoliosis and a past car accident
15 injury, and lexapro for depression (Tr. 70-71).

16 The record is not clear plaintiff's disability began on
17 August 15, 2003, as he alleges. The record shows deteriorating
18 physical problems, but it also reveals problems with plaintiff's
19 credibility. As noted, plaintiff appears to have been less than
20 truthful with PAC Hastings about having a PCP. In addition, the
21 record reflects plaintiff told Dr. Stutzman in September 2004 (a
22 year after alleged onset) he jogged a mile and half 3-4 times a
23 week (Tr. 183). In his request for reconsideration Mr. Goetz
24 states "I only tried jogging once for two weeks (didn't help and
25 hurt too much)" (Tr. 28). Plaintiff testified he jogged less than
26 a year, probably 6- 8 months, and this included July 2004, eleven
27 months after alleged onset (Tr. 485, 494). About five weeks after
28 alleged onset, plaintiff admitted he was not honest with Dr.

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1 Stutzman at his first appointment about chronic pain. He opined
 2 currently he is fairly functional (Tr. 192). Xrays in September
 3 2003, two weeks after alleged onset, show mild degenerative
 4 changes in the midthoracic spine and no significant intervertebral
 5 disc space narrowing (Tr. 197). An MRI in November 2004 shows mild
 6 disc protrusion at T9-10 and T11-12, and degenerative changes in
 7 the midthoracic spine (Tr. 195).

8 The date plaintiff's various impairments became disabling is
 9 unclear. Therefore, the ALJ was required to call a medical expert
 10 to aid in determining the onset date, and his failure to do so is
 11 reversible error. See *Armstrong*, 160 F.3d at 590, citing *Morgan*,
 12 945 F.2d at 1082-1083; *DeLorme*, 924 F.2d 841, 848-849 (9th Cir.
 13 1991); *Gage v. Apfel*, 550 F.3d 808, 810 (9th Cir. 2008).

14 Because the Court is unable to clearly determine the onset
 15 date, remand for medical testimony is required.

16 **II. Materiality of DAA**

17 The Commissioner asks the court to remand to determine
 18 whether DAA materially affects the disability determination. Even
 19 if the ALJ had not erred by inferring plaintiff's onset date
 20 without the assistance of a medical expert, a remand would still
 21 be necessary in this case because the ALJ did not perform the DAA
 22 analysis required. See *Bustamante v. Massanari*, 262 F.3d 949, 954
 23 (9th Cir. 2001).

24 "A finding of "disabled" under the five-step inquiry does
 25 not automatically qualify a claimant for disability benefits.'" *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007), cert. denied,
 26 128 S. Ct. 1068 (2008), quoting *Bustamante*, 262 F.3d at 954.
 27 "Under 42 U.S.C. § 423(d)(2)(C), a claimant cannot receive
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1 disability benefits 'if alcoholism or drug addiction would
 2 be a contributing factor material to the Commissioner's
 3 determination that the individual is disabled." (*Id.*). "Under the
 4 implementing regulations, the ALJ must conduct a drug and alcohol
 5 analysis by determining which of the claimant's disabling
 6 limitations would remain if the claimant stopped using drugs or
 7 alcohol." (*Id.* at 747).

8 The ALJ found plaintiff disabled. He opined overuse of
 9 medication affects plaintiff's mental impairment. The ALJ
 10 explicitly found overuse of narcotic pain medication exacerbates
 11 mood, i.e., worsens symptoms of diagnosed depression. Inexplicably
 12 the ALJ failed to perform the required substance abuse (DAA)
 13 analysis. The ALJ opined:

14 [a] longitudinal review of the opinions concerning
 15 the claimant's mental impairment suggest[s] that
 16 his mood waxed and waned over time, and that these
 17 changes were the result of psychosocial and
 environmental stressors, exacerbated by the
 claimant's overuse of narcotic pain medications.
 Moreover, none of the claimant's "exacerbations"
 appeared to last twelve months or more.

18 (Tr. 345).

19 The ALJ is required to determine if DAA is material to the
 20 disability determination if he finds plaintiff disabled and there
 21 is evidence of substance abuse. This he failed to do.

22 The Court's review of the record indicates there are
 23 unresolved issues with respect to plaintiff's onset date and the
 24 materiality of substance abuse, determinations not within the
 25 Court's purview. And the Court's review of the record does not
 26 clearly require a finding of disability. Under these circumstances
 27 remand is necessary.

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On remand, the ALJ should: (1) determine plaintiff's disability onset date with the assistance of a medical expert, and (2) assess whether substance abuse is material to the disability determination.

The court expresses no opinion as to what the ultimate outcome will or should be. The fact-finder is free to give whatever weight to the evidence is deemed appropriate. See *Sample v. Schweiker*, 694 F.2d 636, 642 (9th Cir. 1982) ("Questions of credibility and resolution of conflicts in the testimony are functions solely of the Secretary."))

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this Court agrees the ALJ's decision is not free of legal error and supported by substantial evidence, but finds there are unresolved issues and the record does not clearly require a finding of disability..

Accordingly,

IT IS ORDERED:

1. Plaintiff's motion for summary judgment (**Ct. Rec. 19**) is **GRANTED**. The matter is remanded to the Commissioner of Social Security for further proceedings consistent with this decision and sentence four of 42 U.S.C. § 405(q).

2. Defendant's motion to remand (Ct. Rec. 26) is DENIED as moot.

The District Court Executive is directed to file this Order, provide copies to counsel for plaintiff and defendant, enter judgment in favor of plaintiff, and **CLOSE** this file.

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1 DATED this 6th day of October, 2010.
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s/ James P. Hutton
JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE

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